United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-2137

Original

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES ex rel. JOHN KELLEHER,

Petitioner-Appellant,

-against-

ROBERT J. HENDERSON, Superintendent, Auburn Correctional Facility,

Respondent-Appellee,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

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BRIEF OF THE RESPONDENT-APPELLEE

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-against- :

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BRIEF OF THE RESPONDENT-APPELLEE

Questions Presented

1. Was appellant's plea of guilty constitutionally entered where such plea was the voluntary and intelligent choice among alternative courses of action open to him?

2. Did appellant exhaust his State remedies on his claim that his plea was unconstitutionally entered because he was unaware of the minimum and maximum terms of imprisonment he faced where such claim was never presented to the New York courts?

Statement

This is an appeal from an order of the United States District Court for the Southern District of New York dated August 6, 1975 (Werker, J.) which denied appellant's application for a writ of habeas corpus. Appellant was indicted on June 30, 1971 and charged with Attempted Murder and Possession of a Weapon as a Felony (N.Y. Penal Law §§ 110.00, 125.05). Indictment No. 3446-71.

On December 9, 1971, appellant proceeded to trial. At the close of the People's case, on December 15, 1971, the appellant offered to plead guilty to both counts of the indictment. Appellant admitted that on May 28, 1971, with intent to cause the death of one Danny Maschietto, he attempted to cause his death by shooting him with a pistol, and was then permitted to plead guilty. On January 11, 1972, appellant appeared for sentencing (a copy of the minutes of plea and sentence were submitted to the District Court). Appellant could have received a sentence with a maximum of twenty-five years, but in fact, received a sentence with a maximum of only twenty-one years.

In October, 1972, appellant moved to vacate his judgment of conviction pursuant to § 440.10 of the New York Criminal Procedure Law (hereinafter CPL). Appellant contended, in his motion, that, at the time of plea, he had been promised a lesser sentence than the one actually imposed, the Court committed various errors of constitutional dimension, that his plea of guilty was coerced, and that he was denied the right to plead not guilty (a copy of this petition was submitted to the District Court).

On November 20, 1972, Justice Starke, of the New York Supreme Court, denied appellant's motion to vacate the judgment. In its order of denial, the Court stated that appellant's "trial counsel concedes that no promise was made by the Court in exchange for the plea, that the fact that defendant, without any basis, may have expected a lesser sentence does not affect the voluntariness of the plea", and that "defendant's claim of coercion is not substantiated either in the motion papers or in the trial record".

On February 6, 1973, Justice Lane, of the New York Supreme Court denied, pursuant to § 460.15 of the CPL, appellant's motion for leave to appeal from Justice Starke's denial of his motion to vacate judgment.

On March 7, 1973, Justice Starke denied appellant's motion to reargue his previous motion to vacate judgment.

Appellant appealed from the judgment of conviction upon his plea of guilty, contending that the court below should have made further inquiry to determine if he fully understood the difference between intent to kill and intent to cause serious physical injury when he pleaded guilty (a copy of appellant's brief was submitted to the District Court).

On March 16, 1973, the New York Supreme Court, Appellate Division, First Department unanimously affirmed appellant's conviction.

On April 9, 1973, Stanley H. Fuld, Chief Justice of the Court of Appeals of the State of New York, denied appellant leave to appeal to the New York Court of Appeals on the ground that "upon the record and proceedings herein, there is no question of law which ought to be reviewed by the Court of Appeals. . ."

Thereafter, appellant instituted an application for a federal writ of habeas corpus claiming that his constitutional rights under the Fourteenth Amendment of the Constitution were violated since his attorney falsely represented to him that he would receive a fifteen year sentence and did not inform him of the maximum or minimum penalties he faced upon his plea to attempted murder. On January 20, 1975, this Court ordered that an evidentiary hearing be held to explore (1) whether the substance of appellant's claims were fairly presented to the New York Court in line with Picard v. Connor, 404 U.S. 270 (1971); (2) if the Picard standards were not met, whether in light of NYCPL § 440.10(2)(a) (McKinney, 1971), the exhaustion requirement of 28 U.S.C. § 2254(b) and (c) has been met; (3) whether the appellant, either through the Court proceeding, his counsel or other independent source was aware of the full range of sentences and (4) if the answer (3) is no, whether the appellant's plea violated due process of law. This evidentiary hearing was held on April 17, 1975.

Hearing

Richard J. Ferguson, Esq. testified that he was an attorney admitted to practice in the State of New York since 1936 (H. 4-5). He identified the appellant John Kelleher and stated that he met the appellant in November, 1971 after the Appellate Division assigned him to handle appellant's trial which was then pending in the New York Supreme Court (H. 5). He met appellant approximately fifteen to twenty days before the start of the trial. Appellant wished to go to trial and to proceed with the defense of the indictment. He stated that Mr. Cryan, the Assistant District Attorney in charge of the prosecution, had said that he would offer a plea to the defendant if he wished to take it which would be a minimum of six years and a maximum of eighteen years. He spoke to the appellant about this offer but the appellant refused to accept it (H. 6).

At the end of the prosecution's case, when the People rested, the appellant advised Mr. Ferguson that he wished to plead guilty (H. 7). Mr. Ferguson approached the bench with Mr. Cryan, the Assistant District Attorney, and informed the Judge that the defendant had said he wanted to plead guilty. He then spoke with Mr. Kelleher and told him that the Court would give him some consideration in imposing sentencing. He stated that he did not discuss the minimum or maximum sentence for the crime of Attempted Murder (H. 8).

On cross-examination, Mr. Ferguson testified that he is a general practitioner who does mainly criminal work in the New York courts (H. 10-11). He spoke with the defendant in the Tombs after his appointment as his attorney. He conducted a Wade hearing on appellant's behalf prior to the trial. The defendant was, of course, present (H. 12-14). He stated that he discussed the charge with the defendant (H. 14), but he did not direct himself toward any pleas since Mr. Kelleher indicated that he wanted to go to trial. Thus, Mr. Kelleher never inquired with respect to the maximum possible sentence (H. 15).

He recalled that Cryan had offered the defendant six to 18 years (H. 15-17). He discussed the six to eighteen years offer with Kelleher who stated "absolutely not" (H. 17). Mr. Ferguson testified that he attempted to obtain a lesser plea for the defendant to a C felony but the District Attorney would not go along with it (H. 26-27). The Judge also would not go along with it (H. 28).

At no time did he make any sentence promise to the defendant except that he would receive some consideration (H. 31).

Upon questioning by the Court, Mr. Ferguson stated that the defendant was not surprised when the six to eighteen year sentence was mentioned that there was a minimum. He only recalled his complete lack of interest in taking such a plea (H. 35).

John Kelleher testified next. He stated that he did not communicate to Mr. Ferguson that he wished to plead guilty until after the People's case. He stated to Mr. Ferguson, "Let's hang this up". Previously, Mr. Ferguson had told him that the District Attorney wanted to knw if he was interested in six to eighteen. His reply was, "You've got to be kidding" (H. 39).

He testified that prior to his plea, no one informed him what the minimum and maximum sentences could be for the crime to which he was going to plead guilty (H. 40). Appellant testified he did not find out the 25 year maximum term he faced until he started serving his term in State prison (H. 42).

He admitted that in addition to his current conviction he had been convicted of various other crimes - simple assault and petty larceny in 1963; attempted robbery in the third degree in 1964 or 1965; petty larceny in 1969; simple assault in 1971. He received a five year reformatory term on the attempted robbery and six months on the petty larceny (H. 42-43).

On cross-examination, Mr. Kelleher testified that in addition to Mr. Ferguson, he had been represented by two other attorneys (H. 43-44). When he spoke to Mr. Ferguson, he never mentioned a plea. He said he was going to trial (H. 49). He gave his attorney the names of witnesses he wanted to call and where they could be found. He himself tried to locate these witnesses through various means but he could not locate any of them (H. 52). He was not out on bail prior to trial (H. 52-53).

He recalled having a discussion with Mr. Ferguson concerning a six to eighteen year sentence prior to the beginning of his trial but subsequent to the Wade hearing. He said six to eighteen was "out" [b]ecause he was going to trial (H. 54).

He thought that after trial he would have gone home. It was up to the jury. He realized that he might also be convicted if he went to trial. That was what the trial was all about (H. 56).

After hearing the People's case, he told Mr. Ferguson, "I think we better hang this up". He did not ask Mr. Ferguson what sentence he could serve. He knew he was going to jail if he took a plea of guilty (H. 59), but he never asked anybody the possible sentence he faced (H. 73-74). He testified he did not learn the maximum sentence until he got to Sing Sing Prison. (H. 74).

He testified he spent thirty months in the Elmira Reformatory; that he was paroled from Elmira; violted his parole and was returned, spending five more months at Elmira (H. 76-77). He admitted a prior arrest in 1962 or 1963 on a homicide charge (H. 76).

The Trial and Plea

Charles McKenna testified that he was going to work on May 28, 1971 about 11:20 to 11:30 P.M. He was going to his parking spot underneath the FDR Drive when he saw what he thought was an

accident between a truck and a car. He saw a man inside the car. His face was a mass of blood. He asked the security guard at the Bank where he worked to call somebody. The man in the car told him he had been shot. He came to know him as Dannie Maschietto (T. 94-106).

Patrolman Charles Goffrendo testified that on May 28, 1971, he was on the midnight tour. He went to Wall and South Streets. He saw a car slammed into the back of a News truck; Dannie Maschietto was in the car; he was bleeding from the head (T. 112).

Dannie Maschietto testified. He identified the defendant. He had met him a week before May 28, 1971 in Block's Bar on Division and Canal Streets during a discussion about selling stereo tape decks. He knew the defendant's brother Kenny. Kenny introduced the defendant and called him Johnny Irish. He and Kenny talked about the tape decks. The defendant was right there during the discussion (T. 133-140).

Maschietto went back to Staten Island. He called Kenny to tell him the load was gone. On May 28th, he called Kenny again since the load was again available. Kenny was not there. He spoke to the defendant who asked if he could take over. Maschietto said okay. He went and got his daugther's car and went to Manhattan (T. 141-144).

He went to Block's Bar and saw the defendant who introduced him to Sam the Jew. He had to go to Staten Island to check the stuff. At that point the defendant and a third fellow left the Bar. They came back in twenty minutes with guns (T. 145-146). Then the defendant, Sam the Jew and this third fellow left the Bar with him. The defendant got into his daugther's car with him and told him to follow the other two in the truck (T. 146).

He followed the truck to Wall and South Streets. The truck stopped. The defendant got out and went to converse with the two in the truck. He came back and said "He'll take the car". Maschietto told him he had to be kidding. It was his daughter's car. He said he didn't kid. He pulled out a piece and shot him in the head. He learned he had been shot five times in the head and once in the shoulder. The pistol was two inches from his head (T. 146-149)

He suffers continuous pain in the left side of his head and face. He lost his hearing in the left ear. He is losing his hearing in the other ear but nothing can be done about it. He also lost part of the vision in his right eye (T. 152-154).

Detective Edward W. O'Brien testified that he was given the defendant's name by Maschietto (T. 205-206). He conducted an investigation which led him to Buffalo where he arrested the defendant on June 3 in Tonawanda. On June 4, they returned to New York City where the defendant was arrested for shooting Dannie Maschietto (T. 208).

Tak Ching Lau testified he was a physician at Beekman Downtown Hospital. He explained the defendant's injuries (T. 223).

Frank Telesco testified next. He stated that he lives in Tonawanda, New York, near Buffalo. He knew the defendant for five years, was friendly with him (T. 247-248). He saw him at the end of May or beginning of June. The defendant called him from New York City and asked him to meet him at the airport in Buffalo. The defendant wanted a place to stay (T. 249). He came to Buffalo and said he had shot some guy; the police were looking for him. The defendant told him that he had a deal with some guy about some stereos. He felt the guy was trying to beat him. He also heard the guy was looking for him. The defendant told him he shot the guy in a car. The car ran into a truck. He said two other guys were with him. He was shown a clipping about the shooting (T. 250-253). He could not understand why the fellow was still living. The defendant said he shot the guy five or six times (T. 263).

The People rested and the defendant offered to plead guilty. He was throwing himself on the mercy of the Court. He was told he faced a very big sentence, a very stiff sentence. He went on the admit that he had shot Dannie Maschietto (T. 265-269).

Opinion of the District Court

The District Court held that appellant's claim that he was never informed of the maximum or minimum terms to which he might be sentenced was never advanced by appellant in the State courts and that he had failed to meet the standards of Picard v. Connor, 404 U.S. 270 (1971).

The Court, nonetheless, addressed the merits of the claim. Judge Werker held that appellant had failed to persuade the Court that his lack of knowledge of the maximum and minimum terms had affected his ability to make an intelligent decision. The Court held that it was the overwhelming evidence at his trial, primarily through the testimony of his victim, that made appellant plea and, in his words, "hang it up". On the record as a whole, Judge Werker found that it would be incredible to conclude that appellant would not have pleaded guilty had he known that he faced a maximum of twenty-five years.

ARGUMENT

APPELLANT'S PLEA WAS CONSTITUTIONAL IN ALL RESPECTS.

The District Court, weighing all the circumstances, held that appellant's plea of guilty was valid. United States v. Lombardozzi, 436 F. 2d 878 (2d Cir.), cert. den. 402 U.S. 908 (1971). The Court found that appellant had failed to persuade it that his

lack of knowledge of the maximum and minimum terms affected his ability to make an intelligent decision. Jones v. United States, 440 F. 2d 466 (2d Cir. 1971); United States v. Welton, 439 F. 2d 824 (2d Cir.), cert. den. 404 U.S. 859 (1971). The Court stated "it would be incredible to conclude that appellant would not have plead (sic) had he known that he faced a maximum of twenty-five years".

Appellant attacks this holding on two fronts. He claims (1) that the District Court applied an inappropriate legal standard in assessing the validity of the plea and (2) that its factual findings that appellant would not have pleaded guilty had he known that he faced a maximum of twenty-five years was clearly erroneous. Federal Rules of Civil Procedure, Rule 52. But both challenges are without merit.

A guilty plea is a product of many factors and in order to assess its constitutional validity, all relevant circumstances must be weighed. United States v. Lombardozzi, supra.

> "The standards was and remains whether the plea represents the voluntary and intelligent choice among alternative courses of action open to the defendant.
>
> The prohibitions against involuntary or unintelligent pleas should not be relaxed but neither should an exercise in arid logic render those constitutional guarantees counterproductive and put in jeopardy the very human values they were meant to preserve". North Carolina v. Alford, 400 U.S. 25 at 31 and 39 (1970).

The constitutional voluntariness of a plea is not to be determined by a rigid adherence to some prescribed ritual but must be assessed in the light of whether an innocent individual has condemned himself falsely. As was explained by the United States Supreme Court in Brady v. United States, 397 U.S. 742 at 757-758 (1970):

> "This is not to say that guilty plea convictions hold no hazards for the innocent or that the methods of taking guilty pleas presently employed in this country are necessarily valid in all respects. This mode of conviction is no more fool proof than full trials to the Court or to the jury. Accordingly, we take great precautions against unsound results, and we should continue to do so, whether conviction is by plea or by trial. We would have serious doubts about this case if the encouragement of guilty plea by offers of leniency substantially increase the likelihood that defendants advised by competent counsel would falsely condemn themselves. But our view is to the contrary and is based on our expectations that courts will satisfy themselves that pleas of guilty are voluntary and intelligently made by competent defendants with adequate advice of counsel and that there is nothing to question the accuracy and, reliability of the defendants' admissions that they committed the crimes which they are charged. In the case before us nothing in the record impeaches Brady's plea or suggests that his admissions in open court were anything but the truth".

In line with Brady and Alford, this Circuit has held that in order for a defendant to invalidate his plea as unconstitutional, he must establish not only that he did not know the maximum or minimum term he faced, but that this lack of knowledge affected his

ability to make an intelligent decision such that his free will was overborne.* Jones v. United States, 440 F. 2d 446 (2d Cir. 1971); United States v. Welton, 439 F. 2d 824 (2d Cir. 1971).

With respect to a defendant's knowledge of the maximum term of imprisonment, in order to establish that a plea is involuntary in a constitutional way**, the State prisoner must show not only that he was unaware of the maximum possible penalty he faced, but also that he would not have pleaded guilty if he had been so aware. Jones v. United States, supra.

With respect to a defendant's knowledge of the minimum term of imprisonment, in United States v. Welton, supra, a federal prisoner alleged that he was unaware when he pleaded guilty that he was ineligible for parole, i.e. he misunderstood the minimum sentence he would have to serve before he became eligible for release. This Court held that this was insufficient to vacate the judgment of conviction unless the defendant can both show that he was unaware

* It should be pointed out that appellant pleaded at the conclusion of the People's case, giving the trial court an especially good opportunity to assess the basis for appellant's decision. United States v. Podell, 519 F. 2d 144, 149-150 (2d Cir. 1975)

** As opposed to a Rule 11 way, see Korenfeld v. United States, 451 F. 2d 770 (2d Cir.), cert. den. 406 U.S. 975.

of his ineligiblity for parole and that he would not have pleaded guilty had he known this.* This Court went on to observe that Welton's petition fell far short of this standard. He merely claimed that he had not been advised of his ineligibility for parole but failed to allege that had he known of ineligibility, he would not have pleaded guilty (p. 826).**

The evidence at the hearing as well as the trial record conclusively established that appellant's decision to plead guilty was based on his reasonable determination that if the trial continued and the case was sent to the jury, he faced certain conviction with no leverage for seeking leniency. Indeed, in view of the victim's miraculous recovery and his ability to identify the defendant as well as the crucial and highly damaging testimony of Frank Telesco which corroborated the testimony of Maschietto, appellant's assessment was absolutely right. Appellant determined to throw himself on the mercy of the Court at the close of the

* Under New York law, a minimum term of imprisonment is merely a defendant's eligibility date for parole. Accordingly, knowledge of the minimum is merely knowledge with respect to parole opportunities so that a defendant is not misled as to minimum amount of time he may have to spend incarcerated.

** The Court in Welton also discusses the retroactivity of Bye v. United States, 435 F. 2d 177 (2d Cir. 1971), which set out the procedure required by Rule 11 of the Federal Rules of Criminal Procedure, not relevant at bar. It is only the requirement of the federal constitution that is in issue here.

People's case in the hope of obtaining a sentence that was something short of the statutorily prescribed term for attempted murder even at the eleventh hour.

Appellant at the District Court hearing showed himself to be an individual aware of his right. He had a right to put the People to their proof and exercised that right. At the conclusion of the People's case, he realized the increasing vulnerability of his position and threw himself on the mercy of the Court. It was his idea to take a plea. No one was offering him any. He testified at the hearing that he knew he would go to jail if he took the plea. He fully appreciated that he was facing a prison term.

If he asked his lawyer no questions regarding sentence, it was because he rightly concluded that knowledge of the sentence he faced was not relevant. As Mr. Ferguson repeatedly emphasized, appellant was throwing himself on the mercy of the Court. Subsequent events indicated the wisdom of this decision since the trial judge at sentencing stated that if the appellant had been convicted after trial he would have imposed the maximum, twenty five years.

There is absolutely no claim here that counsel was incompetent. Indeed, Mr. Ferguson, notwithstanding appellant's reluctance to plead, attempted to negotiate a plea to a C felony. However, not

surprisingly, in view of the strength of the case, the Assistant District Attorney would not go along with a plea to less than a B felony. Apparently, neither would the Judge (H. 28).

This is not a case such as United States ex rel. Leeson v. Damon, 496 F. 2d 718 (2d Cir. 1974), cert. den., 419 U.S. 954 (1974), or United States ex rel. Hill v. Ternullo, 510 F. 2d 844 (2d Cir. 1975), in which there was some alleged misrepresentation on the part of trial counsel which induced the plea. Undeniably, here there was no misrepresentation by trial counsel. Sentence did just not enter into appellant's deliberations since he rightly concluded there was nothing he could do about the statutory term. In line with his determination to throw himself on the mercy of the Court, his lawyer sought and did receive some consideration for appellant's plea.

Appellant's alleged claim of surprise upon receiving a twenty-one term even if of personal significance is hardly of legal significance. Disappointments in sentencing do not establish a basis for habeas corpus relief unless induced by some misrepresentation. Moreover, even appellant's claim of surprise flies in the face of credulity in view of his knowledge that the District Attorney had offered him six to eighteen years and he received seven to twenty-one years. Moreover, the trial judge had informed him that he faced a very big sentence, a very "stiff" sentence.

Appellant's complete lack of a viable claim for habeas corpus relief is additionally emphasized by the various applications appellant has instituted since his conviction. He never truly believed he had been wronged and consequently never articulated any particular complaint he had with respect to his conviction, relying on various jailhouse lawyers to fashion some grounds for post conviction relief.*

Appellant like almost every other incarcerated individual, is merely seeking some way out-of State prison notwithstanding his admitted wrongdoing. Viewed in the best light here, it is appellant's claim that the legislature has prescribed too long a term for attempted murder. However, this is hardly a basis for attacking the voluntariness of a plea. Appellant should have considered this before he shot Dannie Maschietto in the head five times and in the shoulder once.

Looking at the trial record at bar, the People's case against the appellant was overwhelming, the trial judge was able to assess the evidence against the appellant, there is no "reason

* Certainly, the standard general allegation in every post conviction application when a plea is attacked that it was involuntarily and unknowingly entered without an understanding of the consequences is insufficient to satisfy the standard of Picard v. Connor, 404 U.S. 270 (1971), that a federal claim has been fairly presented to the State courts. Insofar as the District Court noted that there is the possibility that collateral remedies may no longer be available to the appellant so that the exhaustion requirement may have been met, the Court was in error. If appellant has waived his claim under New York law, NYCPL 440.10(2), appellant has similarly waived his claim for purposes of federal habeas corpus relief. United States ex rel. Schaedel v. Follette, 447 F. 2d 1297 (2d Cir. 1971).

to doubt that his solemn admission of guilt was truthful" (Brady at 758) and appellant has utterly failed to establish that the findings of the District Court that his lack of knowledge of the maximum or minimum terms affected his ability to make an intelligent decision was clearly erroneous.

CONCLUSION

THE ORDER OF THE DISTRICT COURT
SHOULD BE AFFIRMED.

Dated: New York, New York
December 12, 1975

Respectfully submitted,

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STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

Arlene Silverman, being duly sworn, deposes and says that she is employed in the office of the Attorney General of the State of New York, attorney for herein. On the 12th day of Dec, 1975 she served the annexed upon the following named person :

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Attorney in the within entitled appeal by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by them for that purpose.

Arlene Silverman

Sworn to before me this
12 day of Dec, 1975

A. Seth Greenwald

Assistant Attorney General
of the State of New York